Supreme Court, U.S.
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No. 87-495

In The

Supreme Court of the United States

October Term, 1987

PAUL ADKINS,

Petitioner,

vs.

SEABOARD SYSTEM RAILROAD
(Now CSX TRANSPORTATION, INC.),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

This brief is submitted by CSX Transportation, Inc., the corporate successor to Seaboard System Railroad,[1] by counsel.

Although in his statement of the case the Petitioner states he "filed a negligence action in Perry Circuit Court in Hazard, Kentucky seeking damages for his disability," the Court of Appeals recognized that no negligence claim was alleged by Petitioner nor did the claims as illuminated during discovery constitute a negligence action. The Court of Appeals wrote:

> Adkins' attorney has attempted on appeal to characterize his claim as a negligence claim, but the Complaint and facts alleged by Adkins indicate that the claim is clearly one for intentional infliction of emotional distress. The Complaint mentions only "deliberate" and "premeditated" acts and makes no reference whatsoever to negligence or lack of due care.

Adkins v. Seaboard System Railroad, 821 F.2d 340, 342 (6th Cir., 1987).

Actually, the allegations by Petitioner in the Complaint and confirmed through discovery are that there was some type of "conspiracy" between the Railroad and two of Petitioner's superiors who supervised him in which they "deliberately and premeditately [sic] con-

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[1]In compliance with Rule 28.1 (Statement of Subsidiaries and Affiliates) Seaboard System Railroad is now known as CSX Transportation, Inc. and is a wholly owned subsidiary of CSX Corporation, a publicly owned corporation. Further reference is made to the Disclosure of Corporate Affiliation and Financial Interests filed in the Brief for Appellee pursuant to 6th Cir. R. 25.

spired to have the Plaintiff terminated [from his employment] without any regard to the possible consequences of their actions . . . culminating in him suffering great emotional distress . . . ." *Adkins v. Seaboard System Railroad, supra* at 341. In the Complaint, and confirmed through discovery, Petitioner alleged he was charged with insubordination for failure to return a telephone call to one of his superiors. R. 24; Adkins deposition, QQ. 149; 193; 197. However, Petitioner never received any charge of insubordination, nor was he discharged. R. 24; Adkins deposition, QQ. 155; 189; 220.

Furthermore, as was noted by the Court of Appeals in its opinion, the Petitioner sought relief through the grievance procedures under his collective bargaining agreement and requested a formal investigation under the agreement. The investigation of this alleged "conspiracy" resulted in a finding of no violation of the collective bargaining agreement. Petitioner did not appeal this finding. *Adkins v. Seaboard System Railroad, supra* at 340-41.

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SUMMARY OF THE ARGUMENT

A claim for wrongful breach of the collective bargaining agreement alleging mental distress and purely emotional injury is not cognizable under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*

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ARGUMENT

REASONS FOR NOT GRANTING THE PETITION

The Petition for Certiorari asserts a "conflict in the decisions of the Nineth [sic] and Sixth Circuit decisions," as a primary basis for granting the Petition. Petition at 8. However, there is no conflict between the decisions of the United States Courts of Appeal presented in this Petition. Presumably, Petitioner is referring to the decision of this court in *Atchison, Topeka & Santa Fe Railway Company v. Buell*, — U.S. —, 107 S.Ct. 1410, 94 L.Ed. 2d 563 (1987), a case which arose out of the United States Court of Appeals for the Ninth Circuit. However, there is no conflict between that decision and the decision of the Court of Appeals below.

The Court of Appeals examined Petitioner's claim under the standards of *Atchison, Topeka & Santa Fe Railway Company v. Buell, supra,* and determined that the Railway Labor Act, 45 U.S.C. § 153 *et seq.*, was not the exclusive avenue for Petitioner's claim. Consistent with this observation, however, the Court of Appeals correctly determined that the claim must be "otherwise compensable" under the FELA. The Court of Appeals noted that the claim of Petitioner raised in his Complaint and as fleshed out during discovery made no reference whatsoever to any negligence or any lack of due care on the part of the railroad employer. *Adkins v. Seaboard System Railroad, supra* at 342.

Claims brought under the Federal Employer's Liability Act traditionally address the following allegations of negligence:

1. Negligence in failing to provide a safe place for the employee to work; and/or

2. Active negligence of the railroad or its employees resulting in injury to the Plaintiff.

Even where the allegations are rooted in otherwise intentional conduct in the limited and narrow situations noted by this Court in *Atchison, Topeka & Santa Fe Railway Company v. Buell, supra* at ——, 107 S.Ct. 1414 n.8, the cause of action still is based upon the employer's negligence in failing to address the harmful work place conditions which ultimately brought about the claimed harm to the employee. While construction of the Federal Employer's Liability Act is broad, the Act nonetheless requires allegations of negligence, at least in the form of failure to provide a safe place to work.

By comparison, the case below was filed in state court alleging a wrongful breach of contract, *i.e.*, refusal to follow established collective bargaining agreement procedures resulting in the alleged mental distress. The state court complaint did not contain any allegations of negligence on the part of the employer or any employee causing injury to the Plaintiff. Significantly, the complaint did not set out any allegations of or references to the Federal Employer's Liability Act whatsoever. Indeed, had the Plaintiff and his counsel intended to allege claims of negligence under FELA, this point easily could have been raised in a Motion to Remand because of the prohibition on removal of FELA cases found in 28 U.S.C. § 1445(a).

This Court expressly declined in *Atchison, Topeka & Santa Fe Railway Company v. Buell, supra*, to determine whether purely emotional injuries are cognizable

under FELA. On the other hand, this Court noted that under *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320 (1972), state actions for wrongful discharge "based squarely on an alleged breach of the collective bargaining agreement" still are within the exclusive jurisdiction of the Railway Labor Act. *Atchison, Topeka & Sante Fe Railway Company v. Buell, supra* at ——, 107 S.Ct. at 1416.

The Petitioner's claims below are that he was charged with insubordination "contra to established procedures" in an effort to discharge him wrongfully. His claim is not negligence under FELA, but instead for breach of his rights as an employee under his collective bargaining agreement. Such a state law claim is based squarely on the collective bargaining agreement. The fact that Petitioner claims mental distress from the alleged breach of his contract rights does not make this a negligence claim under the FELA.

Plaintiff has pointed solely to the claim for damages as the basis for his allegations of negligence. The Court of Appeals below recognized that *Atchison, Topeka & Santa Fe Railway Company v. Buell, supra*, is not to be read to assert that all lawsuits brought by railroad employees automatically constitute causes of action under the Federal Employer's Liability Act. There still must be at least some allegation of negligence.

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CONCLUSION

This was an action brought under state law for breach of the collective bargaining agreement. The United States Court of Appeals for the Sixth Circuit followed the reasoning and mandates of this Court and correctly determined that Petitioner's claim was not cognizable under the Federal Employer's Liability Act. The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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